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**Please find below and/or attached an Office communication concerning this application or proceeding.**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/662,073  
Filing Date: September 12, 2003  
Appellant(s): DODGE ET AL.

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Bryan R. Rosiejka  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 7-28-08 appealing from the Office action mailed 2-27-08.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. Appellant's brief presents arguments relating to a Ground 1 which is not a rejection but an objection which objection is not the basis for nor referred to by any of the remaining grounds of rejection. This issue relates to petitionable subject matter under 37 CFR 1.181 and not to appealable subject matter. See MPEP § 1002 and § 1201.

**GROUND OF REJECTION NOT ON REVIEW**

The following grounds of rejection have not been withdrawn by the examiner, but they are not under review on appeal because they have not been presented for review in the

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appellant's brief. The provisional rejection of the claims on the grounds of nonstatutory obviousness type double patenting set forth in paragraph 13 of the 2-27-08 Office Action.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

01/41818	THE DOW CHEMICAL CO.	06-2001
	(PCT)	
5,149,335	KELLENBERGER et al	09-1992
5,147,343	KELLENBERGER	09-1992
4,798,603	MEYER et al	01-1989
5,728,082	GUSTASSON et al	03-1998
5,520,673	YARBROUGH et al	05-1996

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

**Ground 2:**

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading

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identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Claims 1-9, 12-20 and 22-26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The claims now require a superabsorbent material which has an Absorption Time of about 5+10 a2 minutes or greater, wherein a is the mean particle size of the superabsorbent material in millimeters, and an equilibrium absorption capacity of about 15 g/g or greater as measured by the FAUZEL test and which has been neutralized from 30 mole % to 65 mole % with a monovalent metal hydroxide, and further from 5 mole % to 40 mole % with a divalent metal hydroxide. Appellant cites a plurality of places for support for such added claim language in the first full paragraph of page 15 of the 1-15-08 response. However, while such places provide support for a specific wt % of acrylic acid being first neutralized with sodium hydroxide to one specific mole percentage, e.g. 60% at page 11, lines 19-20, 50% at page 12, line 6, 30% at page 12, line 29, 40% at page 13, line 15, 30% at page 14, line 5, 55% at page 14, line 30, 50% at page 15, line 16 and 65% at page 16, line 5 and then neutralized with a divalent metal hydroxide, i.e. a further 10% with calcium hydroxide, a further 20% with calcium hydroxide, a further 40% with calcium hydroxide, a further 30 % with magnesium hydroxide, a further 40% with calcium hydroxide, a further 15% with calcium hydroxide, a further 20% with magnesium hydroxide and a further 55% with calcium hydroxide, respectively, and then still further specifically processed, e.g. other additional materials, coatings, etc., this is not what is

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claimed, as best understood, see discussion in Ground 5 and Ground 6 (Claim Language Interpretation) *infra*. Additionally, the support, i.e. the Examples, relied upon by Appellant result in materials or composites which have a combination of properties, see, e.g., Table 1 on page 17, which are not the combinations claimed. For example, see the Measured Absorption Time of Examples 7 and 8 relied upon and that claimed in claims 3 and 14 and the Gel Bed Permeability of Examples 3 and 4 and that claimed in claims 4 and 15 and that the property of  $\frac{1}{2}$  Float Saturation is no longer claimed at all. If Appellant maintains such claim language, the portion of the original application which provides support for the scope of the entire combination of each claim in a single embodiment should be set forth, e.g. each possible combination of mole percents of the monovalent and divalent hydroxides set forth in the respective ranges in combination with a claimed Time and capacity, e.g. where is the support for a superabsorbent which includes a Time and capacity as claimed which has been neutralized 30 mole percent with a monovalent hydroxide and further from 5 mole percent with a divalent hydroxide? The same as the former but further from 6 mole percent? from 7 mole percent, etc? The same as the first but neutralized 31 mole percent with the monovalent hydroxide?

Ground 3:

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

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Claims 1-9, 12-20, and 22-26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

As set forth in MPEP 2164.04, the Examiner has the initial burden to establish a reasonable basis to question the enablement provided for the claimed invention. While the analysis and conclusion of a lack of enablement are based on the factors discussed in MPEP 2164.01(a) and the evidence as a whole, it is not necessary to discuss each factor in the written rejection. The language should focus on those factors, reasons and evidence that lead the examiner to conclude the specification fails to teach how to make and use the claimed invention without undue experimentation or that the scope of enablement provided to one skilled in the art is not commensurate with the scope of protection sought by the claims.

First, what is the claimed invention? As set forth in each of the independent claims, the invention is an absorbent composite which comprises superabsorbent material (SAM). The superabsorbent material, as best understood, is selected for use therein based on 1) specific desired physical characteristics including its Absorption Time, equilibrium absorption capacity and Gel Bed Permeability and 2) has been specifically neutralized, and the absorbent composite, i.e. the superabsorbent material alone or in combination with other material, is selected for use therein based on 1) specific desired physical characteristics. Therefore, the claims necessarily also define the invention by the tests or processes used to determine the selection of the superabsorbent used and the physical characteristics 1) of such, e.g. the superabsorbent prior to combination with further composite components, if any, i.e. the fibers, rather than setting forth

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specific superabsorbent compositions or specific superabsorbent/composite combination compositions of the end product, and the tests or processes used to determine the selection of the composite used and the physical characteristics 1) of such, i.e. not the specific superabsorbent/composite combination compositions of the end product.

Second, since the claimed physical characteristics 1) of the superabsorbent prior to combination with the composite to form the end product must be determined and the claimed physical characteristics 1) of the composite must be determined, e.g., by a test used to measure such characteristic, the scope of the claims is enabled to the extent the test, i.e. the method and equipment or parameters thereof, measuring such characteristic is described or disclosed.

In the instant application, for example, the claims require a superabsorbent material which has a specific equilibrium absorption capacity and Absorption Time. While on pages 29-31, a test called “FAUZL” is set forth which measures “a final equilibrium absorption capacity” (emphasis added) and “Absorption Time” using a timer capable of reading 120 minutes, it is still not clear such capacity claimed is the same as the “final equilibrium absorption capacity” (emphasis added) described (Note page 31, lines 6-8 and 15-16, i.e. each measurement is an “equilibrium absorption capacity” whereas the “final equilibrium absorption capacity” is an specifically calculated average) and it is described that there are instances where measurement of 200 minutes not just 120 minutes are required but equipment and the method of measurement have still not been set forth for those instances. In other words, the tests used to measure the claimed physical characteristics are not described or disclosed at all or sufficiently, i.e. not enabled, and thus, the claims relying on such are not enabled.



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Third, the claims set forth the physical characteristics desired of the starting SAM, as best understood, rather than the specific composition of the SAM or SAM/composite in the end product. Therefore, relying on Ex parte Slob, 157 USPQ 172, such claims could cover any conceivable combination of materials whether presently existing or which might be discovered in the future and which would impart the desired characteristic, i.e. the claims are too broad and indefinite since purport to cover everything having the characteristics regardless of its composition (It should be noted that 35 USC 101 sets forth “Whoever invents or discovers any new and useful...composition of matter...may obtain a patent therefor...title, i.e. does not include compositions that have yet to be invented and discovered.) Note also, for example, the specification at page 5, first full paragraph, e.g. “may include”.

Fourth, and similarly, the claims do not set forth any structure of the composite but the superabsorbent, i.e. claims could cover any conceivable SAM material either presently existing or which may be discovered in the future. The claims do not set forth that the article is only SAM, i.e. the claims could cover any conceivable present or future absorbent material which includes at least SAM. The claims do not set forth a specific process by which the SAM of the article is made into the composite, i.e. the claims could cover any conceivable present or future process of making. In other words, the claims could cover any conceivable present or future absorbent composite end product which includes SAM. Note again Ex parte Slob, supra.

Fifth, the lack of enabling description is now further exacerbated for the reasons set forth in Ground 2 supra and Ground 5 infra, i.e. the claimed neutralization of the superabsorbent invention is not supported by the original application and/or it is unclear how it is being neutralized as claimed.

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For these reasons and evidence, the examiner concludes the specification fails to teach how to make and use the claimed invention without undue experimentation or that the scope of enablement provided to one skilled in the art is not commensurate with the scope of protection sought by the claims.

Ground 4:

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Claims 1-9, 12-20 and 22-26 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. As set forth in MPEP 2163, the issue of a lack of adequate written description may arise even for an original claim when an aspect of the claimed invention has not described with sufficient particularity such that one skilled in the art would recognize that the Appellant had possession of the claimed invention. The claimed invention as a whole may not be adequately described if the claims require an essential or critical feature which is not adequately described in the specification and which is not conventional in the art to or known to one of ordinary skill in the art. Further, as set forth in *Fujikawa v. Wattanasin*, 93 F.3d 1559,

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1571, the lack of adequate written description also arises if the knowledge and level of skill in the art would not permit one skilled in the art to immediately envisage the product claimed from the disclosed process. As discussed in the preceding rejection, Ground 3 *supra*, the tests which are essential or critical to the selection of the claimed superabsorbent and/or composite have not been disclosed or disclosed sufficiently, there is a lack of disclosure, and, at the very least, definite claiming of any specific composite or end product composition which is supported by the original application, see Ground 2 *supra* and Ground 5 *infra*, and the claims are too broad in that the claims cover any conceivable combination of ingredients either presently existing or which may be discovered in the future and which may impart the desired characteristics, see Ground 3 *supra* and Ground 5 *infra* also. Therefore, the claimed invention as a whole is not adequately described because the claims require an essential or critical feature which is not adequately described in the specification and which is not conventional in the art to or known to one of ordinary skill in the art and the knowledge and level of skill in the art would not permit one skilled in the art to immediately envisage the product claimed from the disclosed process (Note again, e.g., the first full paragraph on page 5 of the disclosure, i.e. a nonconventional approach using superabsorbent material which may include ranges of properties, i.e. properties defined by nonenabled tests, and, e.g., the Summary of the Invention section on page 3 and the paragraph bridging pages 5-6, especially the use of the terminology “may”, i.e. the composites may have superabsorbent materials which may include certain properties which may address certain deficiencies). Therefore, one skilled in the art would recognize that the Appellant did not have possession of the claimed invention.

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Ground 5:

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Claims 1-9, 12-20 and 22-26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 1, 12 and 23 it unclear how the superabsorbent has been neutralized, i.e. how can the superabsorbent be neutralized from 30 to 65 mole % with a monovalent hydroxide and yet also “further from” 5 to 40 mole % with a divalent hydroxide? Also, for the reasons also set forth supra, the claims are indefinite, vague and too broad, see Ex parte Slob, Ground 3 supra.

Ground 6:

***Claim Language Interpretation***

The terminology “superabsorbent material” and “target area” will be interpreted as set forth on page 5, lines 13-16 and page 6, line 16. It is noted with respect to the latter that the terminology “the immediate vicinity” is considered relative absent claiming of specific dimensions. All other claim language will given their usual, e.g. dictionary, definition. It is noted that lines 6-8 of claim 1 and similar language in claims 12 and 23 describe the processing of the superabsorbent material, i.e. a product by process, see MPEP 2113. However, due to the

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lack of clarity set forth supra in Ground 5, a composite, product or garment as claimed in claims 1, 12 and 23, respectively, which includes a superabsorbent which is neutralized at least 30 mole percent by at least one of a monovalent or divalent metal hydroxide at some time prior to the completion of the manufacture of the end product will be considered to meet the claim limitation

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Claims 1-9, 12-20 and 22-26 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Dow PCT '818.

In regard to claims 1-4 and 24, see, e.g., the Claim Language Interpretation section supra, and '818 at the abstract, page 3, last full paragraph, page 5, first through third full paragraphs, page 6, line 19-page 7, line 5, page 7, line 19-page 8, line 19, page 9, lines 5-7 and 16-20, and page 9, line 24-page 14, last line of '818, i.e. an absorbent composite comprising superabsorbent material as disclosed, e.g. superabsorbent material comprising partially neutralized acrylic acid and which has been neutralized to the percentage claimed, as best understood, see the Claim Language Interpretation section supra and page 6, lines 19 et seq, i.e. at least 30 mole %, by alkali metal hydroxides, including specific mention of sodium hydroxide (alkali metals include calcium also), an internal crosslinking agent, a surface cross-linking agent, a capacity greater than 25/g/g and an Absorption Rate Index which is a time which equals about  $10+10^2$  as

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claimed (It is noted that, especially due to the lack of enablement, it is unclear whether this time is the same as the claimed "Absorption Time" or not). Thus the Dow reference clearly teaches all the claimed structure and properties except for the characteristics of "Absorption Time" and the Gel Bed Permeability of the superabsorbent material as claimed. However, as noted supra, Dow does teach similar materials for similar purposes and same or substantially similar properties, i.e. a capacity and a slow absorption time. It is also again noted such characteristics are those of the superabsorbent making up the claimed composite, and such material, as now best understood, is tested prior to formation of such composite by the disclosed tests or processes, i.e. the specific characteristics of such material of the end product composite are unknown, and those of the composite, i.e. the specific characteristics of the end product composite, are also unknown. Therefore it is the Examiner's first position that for the reasons set forth supra, i.e. same or similar compositions, purposes, desired properties to accomplish such purposes, etc., there is reasonable factual basis to conclude that the structure of the Dow also inherently possesses superabsorbent material and an absorbent composite with the claimed test characteristics or values when tested according to Applicants' tests, as best understood. In any case, the Examiner's second position, at the very least, the general conditions of the claim are disclosed by Dow and it is not inventive, i.e. it would be obvious to one of ordinary skill in the art, to discover the optimum or workable ranges, i.e. Applicant's ranges, by routine experimentation, *In re Aller*, 105 USPQ 233 (CCPA 1955).

Claims 5-9, 12-20, 22-23 and 25-26: See the discussion of claims 1-4 and supra as well as page 9, line 28-page 11, line 13, and thus Kellenberger '335 and '343, Meyer '603, Yarbrough '673 and Gustafsson '082 incorporated thereby which teach the SAM material distributed

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homogenously within a composite, e.g. '343, zoned within a composite, e.g. '335, 603, '673, '082, within a layer of a plurality of layers of a composite, e.g. '082, '673 or '603, alone or zoned in such layer, e.g. '673, zoned along a perimeter, e.g. '673, or laminated onto a substrate, e.g. '673.

### **(10) Response to Argument**

#### **Ground 2:**

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Appellants' arguments on pages 5-6 which are substantially the same as those filed 1-15-08 have been reconsidered but are still deemed not persuasive for the reasons set forth in Section 9, Ground 2 *supra*, i.e. lack of original support for the claimed combinations. It is noted that the footnote at the bottom of claim 6 refers to *Wertheim* wherein both a range and specific examples were originally set forth and relied upon. However such is distinguishable from the instant application in which specific examples only are originally supported and relied upon by Appellant.

Therefore the rejection of claims 1-9, 12-20 and 22-26 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement is deemed proper and maintained.

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Ground 3:

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Appellants' arguments on pages 6-11 which are substantially the same as those filed 1-15-08 have been reconsidered but are still deemed not persuasive for the reasons set forth in Section 9, Ground 3 supra, especially in light of the additional grounds set forth in Section 9, Grounds 2 and 4-5. For example, with respect to Ground 3., a. iii of such arguments, the claims recite superabsorbents, i.e. compounds, by what they do, i.e. their physical test characteristics, rather than what they are. For another example, the claims do not require a "final equilibrium absorption capacity" (emphasis added) nor has collaboration been provided for the assertions with regard to one of ordinary skill set forth in Ground 3., a. i) and ii) of such arguments.

It is further noted with respect to footnote 2 that the Permeability is claimed in, e.g., claim 4, and that the rejection is not merely of the independent claims. Finally it is noted that the remainder of the footnotes, i.e. 3-5 do not appear to be referenced on page 7 at all.

Therefore the rejection of claims 1-9, 12-20, and 22-26 under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement is deemed proper and maintained.

Ground 4:



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Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Appellants' arguments on pages 11-13 which are substantially the same as those filed 1-15-08 and those with respect to Section 10, Ground 3 have been reconsidered but are still deemed not persuasive for the reasons set forth in Section 9, Ground 4 *supra*, especially in light of the additional grounds set forth in Section 9, Grounds 2-3 and 5 and Section 10, Ground 3, *supra*.

Therefore the rejection of claims 1-9, 12-20 and 22-26 under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement is deemed proper and maintained.

Ground 5:

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Appellants' arguments on pages 13-15 which are substantially the same as those filed 1-15-08 have been reconsidered but are still deemed not persuasive for the reasons set forth in

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Section 9, Ground 5 supra, and/or because such are, e.g., narrower than the claim language. For example, with respect to Ground 5., a., i) of such arguments, the claims still do not require neutralization from 30 mole percent to 65 mole percent with a monovalent metal hydroxide and neutralized a further 5 mole percent to 40mole percent with a divalent metal hydroxide, i.e. the claim language is “and further from 5 mole % to 40 mole %” not a further 5 mole % to 40 mole percent. With respect to Ground 5., a., ii) of such arguments, see the discussion of Sections 9 and 10, Grounds 3 and 4, supra.

Therefore the rejection of claims 1-9, 12-20 and 22-26 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is deemed proper and maintained.

Ground 6:

Claims 1-9, 12-20 and 22-26 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 1 is considered to be representative of such group of claims.

Appellants' arguments on pages 15-21 which are substantially the same as those filed 1-15-08 have been reconsidered but are still deemed not persuasive for the reasons set forth in Section 9, Ground 6 supra, especially in light of the additional grounds set forth in Section 9, Grounds 2-5, and/or because such are, e.g., narrower than the claim language. For example, the claims still do not require neutralization from 30 mole percent to 65 mole percent with a

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monovalent metal hydroxide and neutralized a further 5 mole percent to 40mole percent with a divalent metal hydroxide, i.e. the claim language is “and further from 5 mole % to 40 mole %” not a further 5 mole % to 40 mole percent.

Therefore the rejection of claims 1-9, 12-20 and 22-26 under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Dow PCT ‘818 is deemed proper and maintained.

**(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Karin M. Reichle/

Primary Examiner, Art Unit 3761

Conferees:

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761

/Angela D Sykes/

Supervisory Patent Examiner, Art Unit 3762

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